

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 93**

[Docket No. 25758; Amdt. No. 93-65]

RIN 2120-AD93

**High Density Traffic Airports; Slot Allocation and Transfer Methods****AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).**ACTION:** Final rule.

**SUMMARY:** This action amends the Federal Aviation Regulations governing the allocation and transfer of air carrier and commuter operator slots (*i.e.*, instrument flight rules (IFR) takeoff and landing reservations) at Kennedy International Airport, LaGuardia Airport, O'Hare International Airport, and Washington National Airport. This amendment adds a definition of "limited incumbent carrier" to refer to air carriers and commuter operators holding fewer than 12 slots at a high density airport; provides for allocation of slots by lottery to certain new entrant and limited incumbent carriers; restricts the transfer of newly acquired lottery slots and provides for the recall of those slots upon the sale or merger of the limited incumbent slot holder; amends the minimum slot use requirements; amends the slot use reporting requirements; and removes an obsolete penalty provision. This amendment is designed to promote the availability of slots to new entrant and limited incumbent carriers at the high density airports, and thereby enhance competition.

**EFFECTIVE DATE:** November 1, 1992.

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**SUPPLEMENTARY INFORMATION:****Background**

The High Density Traffic Airport Rule, 14 CFR part 93, Subpart K, limits the number of IFR operations during certain hours or half hours at Kennedy International, LaGuardia, O'Hare International, and Washington National Airports. Comprehensive rules for the Allocation and transfer of high density airport slots were adopted in 1985 (14 CFR part 93, subpart S; 50 FR 52195, December 20, 1985). A "slot" is defined as the authority to conduct one allocated IFR landing or takeoff operation during a specific period at one

of the high density airports. These periods are either 30 or 60 minutes, depending on the airport.

On December 16, 1988, the Department of Transportation issued Notice of Proposed Rulemaking No. 88-18 (53 FR 51628, December 22, 1988). In that notice, the Department denied the petition of America West Airlines to withdraw slots from incumbent carriers at National and LaGuardia Airports and to reallocate those slots to new entrant and smaller incumbent carriers. The Department sought comments on the effects of the slot restrictions on competition and market entry, as required by § 149 of Public Law 100-457.

Notice No. 88-18 also proposed two specific amendments to the current slot rules. The first proposal was to forego withdrawal of slots, for reasons other than non-use, from a carrier with eight or fewer slots if the carrier itself used the slots and did not lease them to other carriers. The second proposal was to increase slot use requirements to 80% or 90% for carriers holding a substantial number of slots.

On August 22, 1989, the Department published Amendment No. 93-57, protecting a carrier holding and operating fewer than eight slots from withdrawal of those slots, and amending the definition of "summer" and "winter" season to conform to current daylight savings times dates under Federal law (54 FR 34904; corrected 54 FR 37303, September 8, 1989). Amendment No. 93-57 also redefined commuter operations as those using turboprop or reciprocating aircraft having fewer than 75 passenger seats. The Department subsequently amended § 93.123(c) to include in the definition of "commuter aircraft" turbojets with a maximum seating capacity of less than 56 passengers (56 FR 41200, August 19, 1991).

In 1990, Congress passed the Omnibus Reconciliation Act of 1990, Public Law 101-508 (104 Stat. 1388). Title IX of the Act, referred to as the "Aviation Safety and Capacity Expansion Act of 1990," (104 Stat. 1388-371) contains in section 9126(a) a provision that the Secretary of Transportation shall, by July 1, 1991, initiate a rulemaking proceeding to consider more efficient methods of allocating existing capacity at high density traffic airports in order to provide improved opportunities for operations by new entrant air carriers. The section also defines the term new entrant air carrier, as used with respect to a high density traffic airport, as an air carrier having less than 12 operating rights at such airport.

The Department determined that the most productive and efficient means of

initiating the rulemaking required by Public Law 101-508 was to incorporate it in Docket No. 25758. Continuing and supplementing the rulemaking initiated in December 1988, the agency issued Supplemental Notice of Proposed Rulemaking No. 88-18A (SNPRM) on September 9, 1991 (56 FR 46674, September 13, 1991), modifying the proposal.

The SNPRM proposed to (1) add a new definition for limited incumbent, to mean an air carrier or commuter operator holding fewer than 12 slots, including slots transferred or lost for non-use by a carrier since adoption of the allocation rules in December 1985, at the airport; (2) exclude non-limited incumbents from participating in a lottery of unallocated slots until all new entrant and limited incumbent participants had completed their selections; (3) restrict transfer of the slots obtained by new entrants and limited incumbents for 24 months after selection in a lottery and withdraw the slots upon any sale or merger of the operator if the carrier obtaining the slots would, as a result, hold a combined slot base of more than 12 slots; (4) increase the percentage of slots use required to avoid withdrawal for non-use to 90 percent or, for slots allocated for less than 5 days per week, 65 percent; (5) not apply the use-or-lose provisions to slots held or operated by a carrier in bankruptcy until the expiration of 60 days after the initial bankruptcy filing, 30 days after cessation of operations, or up to 20 days after filing a Hart-Scott-Rodino notice with the Department of Justice; (6) require the reporting of international slot use by U.S. carriers already required to report domestic slot use; (7) disallow counting the use of a domestic slot for a flight for which the carrier has obtained an international slot under § 93.217; and (8) remove obsolete penalty provisions.

**Discussion of Comments**

The Department received 23 comments covering all of the various issues raised in Notice No. 88-18A. This discussion divides the comments into the following categories: (1) Lottery procedures and restrictions on transfer of lottery slots; (2) notice to new entrants and limited incumbents of pending slot sales; (3) minimum slot use percentage; (4) bankruptcy provisions; (5) reporting the use of international operations; and (6) bimonthly slot use reports. Comments received on Notice 88-18 that were considered but not addressed in the SNPRM are not discussed here because they are no longer germane due to changes in the

proposal or do not address issues beyond those covered by the comments to the SNPRM.

*Lottery Procedures and Restrictions on Transfer of Lottery Slots*

Most of the commenters support the procedures as proposed. The City of Chicago Department of Aviation concurs with the Department's proposed definition of limited incumbent and considers the proposed lottery provisions and restrictions reasonable, fair, and appropriate to ensure that slots are allocated for real service goals. The Port Authority of New York and New Jersey and the Metropolitan Washington Airports Authority (MWAA) view the creation of the limited incumbent carrier as pro-competitive. Midwest Express Airlines supports encouraging the sale of marginally used slots to limited incumbents and new entrants. America West Airlines supports extending the status of limited incumbent to carriers holding up to 12 slots.

Several commenters seek to modify the proposal. Northwest Airlines generally concurs with the proposed amendments governing the lottery process and slot transfer but believes that incumbent carriers should not be precluded from obtaining permanent slot assignments by lottery. United Airlines also believes that the Department should revise the proposed rule to allow permanent allocations to incumbent lottery participants. America West urges permitting intra-airport trades with incumbents of slots obtained in a lottery and reducing the mandatory operating period for lottery slots to one year. The City of New York Department of Business Services, the Port Authority of New York and New Jersey, and other commenters support merging air carrier and commuter slots into a single slot pool. Business Express believes that the proposed rule unfairly penalizes incumbent carriers by denying them equal participation in the lotteries. The Staff of the Bureau of Economics of the Federal Trade Commission (FTC) comments that transfers likely represent an efficient reallocation of resources" and that the proposed transfer restrictions would perpetuate any misallocation of resources for two years; the FTC staff suggests disqualifying from future lotteries a carrier that sells its lottery slots too quickly.

Two commenters seek special treatment for foreign carriers. Air Jamaica Limited wants the FAA to permanently designate slots for foreign carrier operations or recognize foreign carriers' right to slots based on historical use. Similarly, Air Canada urges the Department to reserve a

permanent pool of recaptured slots to permit foreign carriers to implement rights their governments obtain under future bilateral agreements.

Two primary purposes of this amendment are to achieve maximum utilization of the high density airports' capacity and to enhance competition by affording new entrant and limited incumbent carriers greater access. Equal participation by and permanent allocation of lottery slots to incumbent carriers would reduce the opportunities for new entrants or limited incumbents to obtain slots. The final rule therefore adopts the restrictions on participation by and allocation of slots to incumbents as proposed. Establishing a single slot pool is not within the scope of the proposed rule and is therefore not addressed here. The suggestion to use commuter slots to increase the availability of air carrier slots is not addressed in this rulemaking action but may be reconsidered in the future.

The final rule relaxes the proposed restrictions by allowing intra-airport trades to accord new entrants and limited incumbents greater scheduling flexibility to avoid the forced perpetuation of any misallocation of resources. The two-year mandatory operating period, however, is retained to assure that slots obtained in a lottery are likely to be used for operations by new entrants and limited incumbents and not sold back to other slotholders.

No lottery slots will be set aside exclusively for foreign carriers because making the slots available for use by both domestic and foreign carriers will enhance their utilization. The current slot rules already provide an effective mechanism at O'Hare and Kennedy for allocating slots to foreign carriers as needed without permanent slot designations or pools. A similar mechanism is not warranted for LaGuardia and National because international carriers can serve the same city destinations through airports without slot restrictions, namely, Newark, Baltimore-Washington International, Dulles International, and, except from 3 p.m. to 8 p.m., Kennedy. Furthermore, the FAA does and continues to recognize historical rights under § 93.217(a)(5).

*Notice to New Entrants and Limited Incumbents of Pending Slot Sales*

Public agencies in their comments suggest establishing a list of available slots or prospective slot purchasers, but support for mandatory pre-sale notice is mixed. The Michigan Department of Transportation Bureau of Aeronautics (MDOA) supports requiring incumbent carriers to give notice of pending slot

sales and leases because such notice could increase competition. The Port Authority of New York and New Jersey supports having large incumbents advise new entrants and limited incumbents of opportunities to purchase or lease slots that come on the market. It proposes that the FAA establish an electronic bulletin board to provide notice of pending slot sales or lease opportunities. The Chicago Department of Aviation supports establishing a formal list of qualified new entrants and limited incumbents planning to take part in any slot lottery, and publishing this list in the **Federal Register**. It also states, however, that incumbents should not be required to notify new entrants and limited incumbents of pending slot sales because this adds a new layer of bureaucracy and could impede the buy/sell system. MWAA does not object to establishing a formal list of interested carriers who qualify as new entrants and limited incumbents or providing simple notice of slot availability.

Most of the airlines oppose the notice proposal. Air Transport Association of America (ATA) considers the notice requirement useless and time-consuming, because any carrier interested in acquiring slots can monitor their availability. By contrast, America West supports this proposal because it says it was unaware of certain past opportunities to purchase slots and believes that the proposal creates more of a market mechanism than now exists.

The Department concludes that a notice requirement will not enhance competition or slot utilization to an extent that warrants adoption of the proposal, which would impose an additional burden on the transfer of slots. The final rule, therefore, does not require incumbents to publish slot sale offerings.

*Minimum Slot Use Percentage*

The minimum slot use proposal elicited a mixture of suggested modifications. Many commenters support the 90% weekday standard. Among them are the Port Authority of New York and New Jersey, America West Airlines, MDOT, Air Jamaica Limited, MWAA, Air Canada, Senator Charles S. Robb, and the Coles County Airport Authority, Mattoon, IL. The Staff of the Bureau of Economics of the Federal Trade Commission (FTC) submitted a comprehensive analysis showing that most carriers' slot usage met or exceeded the proposed 90% minimum for weekday slots.

ATA carriers propose an 80%, Monday through Friday, slot utilization requirement, with all three-day national

holiday weekends and non-weekend holidays excluded from this standard. Delta Air Lines, USAir, Trans World Airlines, and United Airlines all support the comments submitted by ATA. The Chicago Department of Aviation supports increasing the current usage requirements for existing slots. However, it views the 90% weekday slot use requirement as too rigid for air carriers operating at O'Hare and suggests a standard that adjusts for inclement weather and holiday-related cancellations.

Other commenters urge a minimum use requirement not to exceed 75%, further tempered by factors ranging from weather to the size of a carrier's slot base. Viewing the 90% weekday usage requirement as unrealistic, unreasonable and unfair, Business Express suggests a method that evaluates the usage of a carrier's entire slot pool and asserts that any usage requirement over 75% would unfairly penalize short haul carriers. The Regional Airline Association believes that the maximum slot usage requirement should be 75%. Air Wisconsin asserts that the 90% weekday slot use requirement should only apply to carriers that have at least 100 air carrier slots or 150 commuter slots at an individual airport, or urges a 75% minimum use percentage based upon operations during the five weekdays. Northwest Airlines urges the following modifications to the proposed rule: (1) A minimum use requirement no higher than 75%; (2) exempting a carrier's slots from withdrawal if its overall slot utilization at that airport equals or exceeds 85% for the reporting period; and (3) excusing cancellations due to mechanical, weather, or other conditions beyond a carrier's control. Midwest Express suggests a minimum usage requirement for limited incumbents below that for carriers with a large number of slots.

The Department has determined that the proposed two-tier minimum percentage system (90% use for weekdays for slots held 5 or more days, and 65% for all others) would complicate slot use enforcement and create loopholes for carriers to meet the minimum use requirements without maximizing use of the slots they hold. For example, Carrier A, holding a 7-day slot at 1200, could trade Monday, Tuesday, and Wednesday to Carrier B, also holding a 7-day slot at 1200, in exchange for Carrier B's 1200 slot on Monday, Tuesday, and Wednesday. Both Carriers A and B would then each hold two distinct slots at 1200, one 3-day slot and one 4-day slot. Under the proposed two-tier system, prior to the

trade the carriers' use of each slot would have to meet or exceed 90%. As a result of the trade, the less stringent 65% minimum would apply while the two carriers' pre-trade flight schedules remain unaffected.

As another way to fall under the 65% minimum, a carrier could create two holding companies and split each of its slots between them, one holding all the carrier's slots the first half of the week and the other holding the same slots the second half, while the carrier operates the slots all 7 days. A two-tier minimum requirement would also introduce complications where, as other examples, a non-carrier holds a slot all 7 days of a week, but one operator uses it 3 days and a second operator uses it the other 4 days, or where two carriers hold the same slot for different days of the week but have leased it to a third carrier for all 7 days.

Because the Department has decided not to adopt a two-tier system, weekend usage of slots will not be excluded from the minimum use requirements. For the reasons set forth below, the Department adopts an 80% minimum use requirement that applies to all slots all 7 days of the week.

In determining a slot usage minimum, the Department wanted to achieve a balance that would not jeopardize the viability of the smaller carriers while still promoting the efficient use of slots. To that end, it considered the comments raising the potential problems of sporadic cancellations caused by weather, mechanical failure, or schedule reductions on a holiday; the 80% requirement factors in these exigencies and should not subject slots to withdrawal based on these cancellations alone. This higher percentage should encourage carriers to hold no more slots than their markets demand, potentially freeing up underutilized slots for use by other carriers without imposing impractically stringent use requirements.

The 80% requirement also closely equates to the intended overall impact of the two-tier slot usage requirement proposed in the SNPRM. Using 44 weekdays and 17 weekend days as representative of the bimonthly reporting period to which the percentage usage requirement applies, a 90% weekday and 65% weekend formula would require a slot to be operated 39 weekdays and 11 weekend days, or 50 total days, out of 61 days. An overall 80% requirement compels 48 days of use out of a 61-day reporting cycle.

The 80% requirement is also based on an analysis of historical slot use. As the FTC staff comment reports, general slot

use by the major slotholders at the high density airports already approaches or exceeds 90%. The closer the use requirement approaches 90%, the more severely it will impact the holders of fewer slots. This historical slot use indicates that a requirement greater than 80% may disproportionately affect the class of carriers for which this amendment seeks to enhance opportunities while providing no further incentive, until it exceeds 90%, for the major slotholders to increase their slot use. The 80% requirement thus accomplishes the twin objectives of improving efficiency and increasing potential access for new entrants without substantially disrupting existing air service.

The Department recognizes that any requirement exceeding 71% for a weekly slot would require flying low-demand weekend periods or turning in the slot permanently for those days. It is not the purpose of this amendment to compel carriers, to avoid slot withdrawal, to fly empty aircraft on weekends when demand does not warrant the operation; in such cases, the carrier may dispose of the slot for those days it does not plan to operate and retain the slot the remaining days of the week.

#### *Bankruptcy Provisions*

The proposed bankruptcy provisions drew relatively few comments. USAir suggested a blanket waiver from the minimum slot use requirement for 60 days after closing on the purchase of a bankrupt airline's slots. America West Airlines supports the bankruptcy provisions as proposed. MWAA opposes extending the moratorium on the minimum slot use requirement in a bankruptcy situation, due to the financial and service impact on an airport.

The rule as adopted is merely refined for practicality in implementation and compliance but otherwise remains unchanged from the proposal. It provides for a one-time 60-day exemption from the date the initial bankruptcy petition is filed, a 30-day exemption from the date of submission of information required by Hart-Scott-Rodino or other Federal law regarding a proposed transfer of assets, and a 30-day exemption following total cessation of operations at a slot-controlled airport. The FAA has previously granted start-up waivers for purchasers of slots in bankruptcy but does not deem an automatic 60-day moratorium in every case, as USAir suggests, as favorable for competition or efficient use of airport capacity. The Department recognizes the disruption in service that an airline

bankruptcy may engender. But continuing to apply the minimum use requirements and consequently withdrawing the slots will impose time pressures that the bankruptcy proceedings cannot realistically accommodate, and expedited reinstatement of service will not necessarily follow.

#### *Reporting Use of International Operations*

The U.S. carriers that operate international routes oppose a requirement to report their international slot usage, as does ATA. Delta Air Lines questions why only U.S. carriers, and not foreign airlines, would be subject to this reporting requirement.

All U.S. carriers holding slots have developed systems for routinely reporting their slot usage. Five out of seven carriers are already reporting their international slot usage along with their domestic usage. The rule as adopted, therefore, has little if any practical impact, and the information provided will greatly assist the FAA's administration of slots. The rule will not require reporting by non-U.S. carriers because the number of slots held by any individual foreign carrier at JFK and O'Hare Airports is limited.

Delta claims that the proposed prohibition against reporting the use of domestic operations in international slots could adversely affect development of its operations at Kennedy International Airport. It seeks flexibility to use domestic slots for international operations that have been assigned international slots. Also opposing the proposed prohibition, TWA similarly argues in favor of scheduling flexibility.

America West Airlines supports the proposed regulations regarding international slots, as does MDOT. MDOT believes that international flights should not be counted toward meeting the minimum slot usage requirement because that practice reduces U.S. communities' access to the national air transportation system.

The Department finds the prohibition against counting international flights toward the minimum use of domestic slots necessary because of the different rules governing withdrawal of international vis-a-vis domestic slots. International slots are not subject to the same withdrawal provisions as domestic slots. Thus, an international flight could be used to fulfill a domestic slot use requirement while the unused international slot escapes withdrawal. Allowing such scheduling flexibility to international carriers not only disadvantages domestic carriers, it also

perpetuates underutilization of the airport's capacity at their expense. Scheduling flexibility for Delta and other carriers operating international routes can still be achieved through the trading permitted under 91.217(a)(2).

#### *Bimonthly Slot Use Reports*

Although the SNPRM did not propose to change the reporting cycle for slot use reports, several commenters suggest extending it. ATA recommends reporting of slot usage quarterly, if not semiannually. USAir, Northwest Airlines, TWA, and United Airlines all support ATA's recommendation. The Regional Airline Association also urges extending the reporting cycle to quarterly.

The bimonthly reports are one source the FAA uses to determine whether slot usage is meeting the minimum requirement. If the reporting period were extended, that information would come in later, delaying the FAA's withdrawal and temporary reallocation of underutilized slots. Slots that another carrier could make greater use of would remain underutilized that much longer. Extending the reporting period would therefore run counter to enhancing the efficient use of slots, and the Department declines to make that change.

#### **Section by Section Description of the Rule**

##### *Section 93.213(a)(5) (definition of "limited incumbent carrier")*

The rule will establish a limited incumbent carrier status. Limited incumbents are defined as air carriers or commuter operators with fewer than 12 slots, including slots previously lost for non-use or sold to other carriers since December 16, 1985. This definition comports with the definition of "new entrant air carrier" in Pub. L. 101-508.

The SNPRM's preamble discussed limited incumbents as carriers holding fewer than 12 slots, but the text of the rule as proposed in the SNPRM would qualify a carrier holding fewer than 12 air carrier slots or 12 commuter operator slots as a limited incumbent. Under that definition, a carrier could hold any number of slots in one category and, so long as it held less than 12 slots in the second category, still qualify as a limited incumbent for the purpose of selecting slots in the second category at a lottery. Such a rule would facilitate the entry of new services, but not necessarily the entry of new carriers.

In defining "limited incumbent carrier," the rule as adopted draws no distinction between air carrier and commuter operator slots, but looks to the total

number of slots held in both categories in any combination at the particular airport. This definition is consistent with the existing "new entrant carrier" definitions in § 93.213(a) and section 9126 of Public Law 101-508 (104 Stat. 1388-371), neither of which draws any distinction among the types of slots allocated.

##### *Section 93.221(a)(1)*

The change to § 93.221(a)(1) merely corrects the address where requests for confirmation of slot transfers are to be sent.

##### *Section 93.221(a)(5) (slot transfer restrictions)*

The rule as adopted imposes new restrictions on slots allocated by lottery to new entrant and limited incumbent participants. The restrictions apply only to slots allocated to a new entrant or limited incumbent carrier in a lottery held after June 1, 1991. Slots acquired by other incumbent carriers will not be subject to the same restrictions, because the allocation to the incumbent would expire on the date of the next lottery. The restrictions are intended to make participation in any lottery financially and logistically impractical for a carrier seeking only to profit from the sale of the slots obtained.

Specifically, until a slot has been used continuously for 24 months by the new entrant or limited incumbent holder, the slot can be sold or leased only to another new entrant or limited incumbent carrier, and can be traded only for another slot or slots at the same airport. Previously, lottery slots could be transferred without restriction after 60 days of operation. Many slots allocated to new entrant carriers under that procedure were sold to larger carriers, sometimes immediately after the minimum 60-day period. Also, peak period slots obtained by new entrant carriers were traded to incumbents for less valuable off-peak slots (and, presumably, other consideration), and the less valuable slots were then returned to the FAA.

The SNPRM proposed to restrict trades, as well as sales and leases, to other new entrant or limited incumbent carriers. This narrow restriction on trading, however, would unduly hamper a carrier's scheduling flexibility. Therefore, the rule as adopted allows trades with any carrier at the same airport, subject to the condition that, if the new entrant or limited incumbent carrier trades away a slot it has obtained in a lottery and then fails to use the slot it obtained through the trade, the trade is automatically void,

and the lottery slot shall be returned to the FAA for reallocation at the next lottery. This condition will encumber the value of slots obtained in a lottery, but should not interfere with a more efficient allocation of slots to meet each trading carriers' genuine scheduling needs.

*Section 93.223(b), (c)(3), (f) (slot withdrawals)*

The amendment of § 93.223(b) is for clarifying purposes only and does not alter the substance of the prior provision. Subparagraphs (1) through (5) have been merged into a single subsection.

The change to § 93.223(c) comports with the revised definition of a limited incumbent. The withdrawal exemption limit is set at 12 or fewer slots, however, to prevent withdrawal from placing a carrier into limited incumbent status, which is defined as holding fewer than 12 slots. The revision also avoids treating differently a carrier that operates slots other than the ones it holds, to the extent that it is not a net lessor of slots.

Similarly, § 93.223(f) uses 12 slots as the limit below which slots will not be withdrawn in the event of a merger but requires surrender of all other slots that were obtained by virtue of new entrant or limited incumbent status. Use for 24 continuous months of any slot obtained by a new entrant or limited incumbent removes the slot's special restrictions, and this provision would then no longer apply.

*Section 93.225 (c), (e), (g), (h) (lottery procedures)*

The rule as adopted will limit primary participation in slot lotteries conducted under § 93.225 to new entrant and limited incumbent carriers. These primary participants must hold appropriate DOT economic authority and an FAA part 121 or part 135 operating certificate. In the past, carriers that had made only substantial progress toward obtaining an FAA operating certificate often failed to continue or even start operations after selecting slots; the requirements to hold appropriate authority will reduce the likelihood of the recurrence of this undesirable result.

New entrant and limited incumbent carriers will not compete in the lottery with carriers already holding a substantial number of slots at the airport. The prior procedure permitting new entrants to select 4 slots rather than 2 in the first lottery sequence will be retained. Limited incumbents may select 2 slots each turn, as before. Carriers holding 12 or more slots at an airport

will be eligible to participate in the lottery only after all participating new entrants and limited incumbents have completed their selections or have reached the 12 slot limit. Slots selected by carriers holding 12 or more slots, or by new entrants or limited incumbents after their slot base reaches 12, will be allocated only until the date of the next lottery at that airport. A carrier that has selected or otherwise obtained 12 or more slots will no longer qualify as a limited incumbent.

Other lottery procedures in § 93.225 remain unchanged.

*Section 93.227(a), (b), (d), (g) (minimum slot use; bankruptcy)*

*Minimum slot use.* The minimum percentage of use for slots under § 93.227(a) will increase to 80 percent. This adjustment will reduce the practice of protecting an unused slot by distributing operations across several slots during the reporting cycle. Each day that a slot is held will be counted in calculating the percentage of use, whether weekdays or weekends. Using different bases for calculation depending on whether a slot is held for five weekdays or another period leaves too much room for circumvention of this new provision. A purpose of the amendment, to enhance capacity utilization, would be diminished as a result. It is not the purpose of this amendment, however, to compel carriers to fly empty aircraft, to avoid withdrawal of the slot, on weekends when demand does not warrant the operation; in such cases, the carrier may dispose of the slot for those days it does not plan to operate and retain the slot for the remaining days of the week.

Carriers will more likely exercise their ability to sell or lease underutilized slots rather than return them to the FAA or lose them through non-use. Forcing this choice will place more slots on the market and thereby enhance competitive opportunities for new entrant and limited incumbent carriers.

*Reporting use of international operations.* Operating a flight in a slot obtained for an international flight under § 93.217 will not count toward the use of any domestic slot. International slots are not subject to the minimum use requirements of § 93.227. The rule as adopted prohibits reporting the use of an underutilized domestic slot for a flight for which the carrier has already been provided an international slot. There is no restriction against using a domestic slot for an international flight, if the carrier has not obtained an additional slot for the flight under § 93.217.

The rule as adopted also amends § 93.227(g) to require reporting the use of

international slots by U.S. carriers that must now report the use of domestic slots under § 93.227(i). This requirement imposes a minimal burden on most U.S. carriers, since they already routinely reported use of international slots as part of their bimonthly slot use reports under § 93.227(i). Including international slots in the same report will help the FAA monitor slot use and patterns of airport operations in peak periods. Reporting by non-U.S. carriers is not required at this time.

*Bankruptcy provision.* The rule as adopted retains a one-time 60-day suspension of the minimum slot use requirement, running from the initial bankruptcy petition. It adds a 30-day period running from the cessation of scheduled operations at a high density airport by a slot operator in bankruptcy. And it creates a 30-day window after the parties to a slot transfer submit additional information in response to a request by a Federal government antitrust or economic oversight agency if the slots involved have not become subject to withdrawal as of the day the information is submitted. The 30-day window will permit the Department of Justice or other Federal agency to conduct reviews of substantial transfers of assets for anticompetitive or economic implications and obtain supplementary information from the carrier without jeopardizing the use-or-lose status of the slots subject to the transfer.

This regulatory structure establishes when unused slots would revert to the FAA, and provides sufficient time for the sale of slots within the bankruptcy process.

*Section 93.229 (penalty provision)*

As adopted in December 1985, § 93.229 provided for a maximum \$1,000 civil penalty for each unlawful takeoff or landing and for each day that a slot is not returned to the FAA when required. In practice, all enforcement actions against violators of the High Density Rule (Part 93, subpart K) and the slot transfer and allocation rules (Part 93, subpart S) have cited violations of § 93.125, which prohibits an operation at a high density traffic airport during restricted hours without an Air Traffic Control reservation. The applicable penalty provisions are contained in § 901 of the Federal Aviation Act of 1958, as amended, and FAR part 13. The separate penalty provision in § 93.229 is unnecessary and, since Congress increased the maximum penalty for carriers to \$10,000 in 1987 (Section 204, Pub. L. 100-223), inconsistent with

current law. The rule as adopted removes § 93.229 in its entirety.

#### Regulatory Evaluation Summary

While the final rule does not significantly alter the current operating environment for either air carrier or commuter operations at the high density airports, it does include several substantive measures that will enhance competition and efficient use of capacity at these key airports. It also incorporates a number of relatively straightforward housekeeping measures, *i.e.*, a definition of limited incumbent carrier, a revision of the slot-use reporting requirements for international and domestic flights, a slight modification of the timetable for slot withdrawal in the event of carrier bankruptcy, and elimination of an obsolete penalty provision.

The revised rule does not withdraw existing slots or create new ones. However, the rule does establish a new incentive to use current capacity—the available pool of airport slots—more efficiently. The amendment increasing the minimum slot-use requirements to 80 percent will make it more difficult for incumbent carriers to hold slots off the market by manipulating flight schedules and operations to meet minimum use requirements and is designed to encourage carriers to sell or lease their marginal slots.

The current practice by some carriers of "babysitting" slots for possible future use may have some merit as an individual corporate strategy, but it entails real economic costs for the system; it is an inefficient use of scarce present resources. In effect, the amendment increases the incentives for carriers to use each slot efficiently in the short term, *e.g.*, to use it for part of the week, as market conditions warrant, and sell or lease it for the days the carrier does not plan to operate a flight. The effects on the major carriers' operations are minimal; no carrier risks losing a slot that it is actually using on a regular basis to meet passenger demand. This change will produce a small but important efficiency gain, increasing overall capacity utilization at the high density airports in the near term. Because of the importance of the high density airports within the national air traffic system, even a marginal improvement in current capacity utilization at these airports is economically meaningful.

Moreover, the 80-percent-use requirement has a procompetitive aspect as well. By creating a stronger incentive for carriers to make underutilized slots available on the market, even on a part-time basis, the rule opens up some new

competitive opportunities for new entrant and limited incumbent carriers. In economic terms, both the air traffic system and the carriers operating few or no flights to a high density airport can be expected to benefit from a rule that requires more efficient slot use: New entrants and limited incumbents can gain access to the airport or improve their competitive position by taking advantage of some previously underutilized slots; and the national system benefits from capturing more of the real economic value of some scarce resources (slots) that are only minimally used at present. The public is likely to gain as well—both from the improved service and lower fares that additional competition should generate and, more broadly, from an improvement in economic efficiency at these critical airports (fewer wasted slots). While these benefits are not directly quantifiable, the Department finds that the net economic effects of the 80-percent-use requirement are positive. In terms of regulatory burden, this modification is entirely neutral and will require no change in airline reporting.

The second major modification to the rule involves the allocation of slots by lottery to new entrants and limited incumbents, as well as some additional protections for slots held by limited incumbents. In brief, these revised lottery procedures and slot resale provisions are designed to safeguard competition by ensuring that new entrants and limited incumbents receive first opportunity to secure slots in the lottery and, once they have secured them, that the slots are actually used by new entrants or limited incumbent carriers, rather than immediately sold, leased, or traded to larger carriers. The limitations on resale or other disposition of slots obtained under the lottery are not excessive, do not unreasonably interfere with the market mechanism, and are fully consistent with the objectives of the slot system in strengthening effective competitive access to these airports by new entrants and limited incumbent carriers. The economic effects of reduced access to these slots by large airlines are offset, in the Department's judgment, by the competitive benefits of ensuring improved access for new entrants and limited incumbents. Moreover, while the Department will assume some additional administrative burden in implementing and monitoring these provisions, the regulatory burden is negligible; these lottery procedures and resale restrictions impose no new reporting requirements on the industry.

The housekeeping amendments have little economic impact but do serve to

clarify and in some cases simplify operation of the slot system at the high density airports. The elimination of the obsolete penalty provision in § 93.299 is consistent with sound regulatory practice and the Administrative Procedures Act. The revised definition of a limited incumbent carrier comports with the definition of a new entrant air carrier in Public Law 101-508, and prevents a potential definitional conflict. The revised timetable for withdrawal of slots in the event of carrier bankruptcy adds a 30-day window for Federal review of slot transfers or following cessation of service, allowing more time for the orderly sale of slots within the bankruptcy process; the modification stems from the Department's recent experience with carrier bankruptcies. And, finally, the revised slot-use reporting requirement with respect to international and domestic flights codifies the standard industry practice of reporting both types of operations; most carriers find it less costly to report both their international and domestic flight operations and already routinely do so. In the Department's judgment, adopting this practice in the revised rule will ensure reporting consistency and impose no undue burden on the industry. This summary represents the regulatory evaluation for this rulemaking, and it is not necessary to place a separate document in the docket.

#### Regulatory Flexibility Act Determination

The Department has determined that the amendment (1) is not a major rule under Executive Order 12291; and (2) is a significant rule under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). For the reasons discussed above under the Regulatory Evaluation Summary, I certify that under the criteria of the Regulatory Flexibility Act, this rule will not have a significant economic impact on a substantial number of small entities.

#### International Trade Impact Analysis

The rule will not affect the sale of foreign aviation products or services in the United States, nor will the rule affect the sale of U.S. products or services in foreign countries. Accordingly, the rule has no international trade impact.

#### Paperwork Reduction Act

This amendment provides for a minor change in the required reporting of information by air carriers to the FAA. Under the requirements of the Federal Paperwork Reduction Act, the Office of Management and Budget previously has

approved the information collection provision of Subpart S under OMB Approval No. 2120-0524. The reporting requirements of the rule as amended are being submitted to OMB for review and will become effective when the requirements are approved.

**Federalism Implications**

This amendment will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**List of Subjects in 14 CFR Part 93**

Air traffic control, Airports, Alaska, Navigation (air), Reporting and recordkeeping requirements.

**The Rule**

For the reasons set out above, the Department of Transportation amends 14 CFR Part 93 of the Federal Aviation Regulations as follows:

**PART 93—SPECIAL AIR TRAFFIC RULES AND AIRPORT TRAFFIC PATTERNS**

1. The authority citation for part 93 continues to read as follows:

**Authority:** 49 U.S.C. app. 1302, 1303, 1348, 1354(a), 1421(a), 1424, 2451 et seq.; 49 U.S.C. 106(g).

2. In § 93.213, new paragraph (a)(5) is added to read as follows:

*§ 93.213 Definitions and general provisions.*

(a) \* \* \*  
 (5) *Limited incumbent carrier* means an air carrier or commuter operator that holds or operates fewer than 12 air carrier or commuter slots, in any combination, at a particular airport, not including international slots, Essential Air Service Program slots, or slots between the hours of 2200 and 0659 at Washington National Airport or LaGuardia Airport. However, for the purposes of this paragraph (a)(5), the carrier is considered to hold the number of slots at that airport that the carrier has, since December 16, 1985:

- (i) Returned to the FAA;
- (ii) Had recalled by the FAA under § 93.227(a); or
- (iii) Transferred to another party other than by trade for one or more slots at the same airport.

**§ 93.221 [Amended]**

3. In § 93.221, paragraph (a)(1) is amended by removing the reference "Slot Transfers, Office of the Chief Counsel, Rules Docket, 800 Independence Avenue, SW., AGC-10 and adding in its place "Slot Administration Office, AGC-230, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Ave., SW."

4. In § 93.221, paragraph (a)(5) is revised to read as follows:

**§ 93.221 Transfer of slots.**

(a) \* \* \*  
 (5)(i) Until a slot obtained by a new entrant or limited incumbent carrier in a lottery held under § 93.225 after June 1, 1991, has been used by the carrier that obtained it for a continuous 24-month period after the lottery in accordance with § 93.227(a), that slot may be transferred only by trade for one or more slots at the same airport or to other new entrant or limited incumbent carriers under § 93.221(a)(5)(iii). This transfer restriction shall apply to the same extent to any slot or slots acquired by trading the slot obtained in a lottery. To remove the transfer restriction, documentation of 24 months' continuous use must be submitted to the FAA Office of the Chief Counsel.

(ii) Failure to use a slot acquired by trading a slot obtained in a lottery for a continuous 24-month period after the lottery, shall void all trades involving the lottery slot, which shall be returned to the FAA. All use of the lottery slot shall be counted toward fulfilling the minimum use requirements under § 93.227(a) applicable to the slot or slots for which the lottery slot was traded, including subsequent trades.

(iii) Slots obtained by new entrant or limited incumbent carriers in a lottery may be sold, leased, or otherwise transferred to another entrant or limited incumbent carrier after a minimum of 60 days of use by the obtaining carrier. The transfer restrictions of § 93.221(a)(5)(i) shall continue to apply to the slot until documentation of 24 months' continuous use has been submitted and the transfer restriction removed.

5. In § 93.223, paragraphs (b), (c)(3), and (f) are revised to read as follows:

**§ 93.223 Slot withdrawal.**

(b) Separate slot pools shall be established for air carriers and commuter operators at each airport. The FAA shall assign, by random lottery, withdrawal priority numbers for the recall priority of slots at each airport. Each additional permanent slot, if any,

will be assigned the next higher number for air carrier or commuter slots, as appropriate, at each airport. Each slot shall be assigned a designation consisting of the applicable withdrawal priority number; the airport code; a code indicating whether the slot is an air carrier or commuter operator slot; and the time period of the slot. The designation shall also indicate, as appropriate, if the slot is daily or for certain days of the week only; is limited to arrivals or departures; is allocated for international operations or for EAS purposes; and, at Kennedy International Airport, is a summer or winter slot.

(c) \* \* \*  
 (3) Except as provided in § 93.227(a), the FAA shall not withdraw slots held at an airport by an air carrier or commuter operator holding and operating 12 or fewer slots at that airport (excluding slots used for operations described in § 93.212(a)(1)), if withdrawal would reduce the number of slots held below the number of slots operated.

(f) For 24 months following a lottery held after June 1, 1991, a slot acquired in that lottery shall be withdrawn by the FAA upon the sale, merger, or acquisition of more than 50 percent ownership or control of the carrier using that slot or one acquired by trade of that slot, if the resulting total of slots held or operated at the airport by the surviving entity would exceed 12 slots.

6. In § 93.225, paragraphs (c), (e), (g), and (h) are revised to read as follows:

**§ 93.225 Lottery of available slots.**

(c) Slot allocation lotteries shall be held on an airport-by-airport basis with separate lotteries for air carrier and commuter operator slots. The slots to be allocated in each lottery will be each unallocated slot not necessary for international or Essential Air Service Program operations, including any slot created by an increase in the operating limits set forth in § 93.123(a).

(e) Participation in a lottery is open to each U.S. air carrier or commuter operator operating at the airport and providing scheduled passenger service at the airport. Any U.S. carrier that is not operating scheduled service at the airport and has not failed to operate slots obtained in previous lotteries, or slots traded for those obtained by lottery, but wishes to initiate scheduled passenger service at the airport, shall be included in the lottery if that operator notifies, in writing, the Slot Administration Office, AGC-230, Office of the Chief Counsel, Federal Aviation

Administration, 800 Independence Avenue SW., Washington, DC 20591. The notification must be received 15 days prior to the lottery date and state whether there is any common ownership or control of, by, or with any other air carrier or commuter operator as defined in § 93.213(c). New entrant and limited incumbent carriers will be permitted to complete their selections before participation by other incumbent carriers is initiated.

\* \* \* \* \*

(g) To select slots during a slot lottery session, a carrier must have appropriate economic authority for scheduled passenger service under Title IV of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1371 et seq.), and must hold FAA operating authority under part 121 or part 135 of this chapter as appropriate for the slots the operator seeks to select.

(h) During the first selection sequence, 25 percent of the slots available but no less than two slots shall be reserved for selection by new entrant carriers. If new entrant carriers do not select all of the slots set aside for new entrant carriers, limited incumbent carriers may select the remaining slots. If every participating new entrant carrier and limited incumbent carrier has ceased selection of available slots or has obtained 12 slots at that airport, other incumbent carriers may participate in selecting the remaining slots; however, slots selected by non-limited incumbent carriers will be allocated only until the date of the next lottery.

\* \* \* \* \*

7. In § 93.227, paragraphs (a), (b), (d), and (g) are revised to read as follows:

**§ 93.227 Slot use and loss.**

(a) *Minimum slot use.* (1) Except as provided in paragraphs (b), (c), (d), and

(g) of this section, any slot not used for 80 percent of the time over a 2-month period shall be recalled by the FAA.

(2) For the purposes of this paragraph (a), operation of a flight for which an international slot was allocated pursuant to § 93.217 will not be considered as use of any other slot, regardless of how the operation is reported by the carrier.

(b) Paragraph (a) of this section does not apply to slots obtained under § 93.225 of this part during:

- (i) The first 90 days after they are allocated to a new entrant carrier; or
- (ii) The first 60 days after they are allocated to a limited incumbent or other incumbent carrier.

\* \* \* \* \*

(d) In the case of a carrier that files for protection under the Federal bankruptcy laws and has not received a Notice of Withdrawal from the FAA for the subject slot or slots, paragraph (a) of this section does not apply:

(1) During a period after the initial petition in bankruptcy, to any slot held or operated by that carrier, for:

- (i) 60 days after the carrier files the initial petition in bankruptcy; and
- (ii) 30 days after the carrier, in anticipation of transferring slots, submits information to a Federal government agency in connection with a statutory antitrust, economic impact, or similar review of the transfer, provided that the information is submitted more than 30 days after filing the initial petition in bankruptcy, and provided further that any slot to be transferred has not become subject to withdrawal under any other provision of this § 93.227; and

(2) During a period after a carrier ceases operations at an airport, to any slot held or operated by that carrier at that airport, for:

(i) 30 days after the carrier ceases operations at that airport, provided that the slot has not become subject to withdrawal under any other provision of this § 93.227; and

(ii) 30 days after the parties to a proposed transfer of any such slot comply with requests for additional information by a Federal government agency in connection with an antitrust, economic impact, or similar investigation of the transfer, provided that—

(A) The original notice of the transfer is filed with the Federal agency within 30 days after the carrier ceases operation at the airport;

(B) The request for additional information is made within 10 days of the filing of the notice by the carrier;

(C) The carrier submits the additional information to the Federal agency within 15 days of the request by such agency; and

(D) Any slot to be transferred has not become subject to withdrawal under any other provision of this § 93.227.

\* \* \* \* \*

(g) This section does not apply to slots used for the operations described in § 93.217(a)(1) except that a U.S. air carrier or commuter operator required to file a report under paragraph (i) of this section shall include all slots operated at the airport, including slots described in § 93.217(a)(1).

**§ 93.229 [Removed]**

8. Section 93.229 is removed.

Issued in Washington, DC, on August 12, 1992.

Thomas C. Richards,  
Administrator.

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